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In the Supreme Court of the United States

OCTOBER TERM, 1994

LOCAL 783, BRIDGE STRUCTURAL & ORNAMENTAL IRON WORKERS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether the court of appeals erred in finding that petitioner violated Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A), by ratifying and condoning acts of violence committed by its members and affiliates.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 23 F.3d 1459. The decision and order of the National Labor Relations Board (Pet. App. B1-B4), and the decision and recommended order of the administrative law judge (Co. Br. App. 1a-37a)[1] are reported at 311 N.L.R.B. 734.

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[1] "Co. Br. App." refers to the appendix to the brief in opposition filed in this Court by respondent BE&K Construction Company.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1994. On August 9, 1994, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including September 11, 1994. The petition for a writ of certiorari was filed on September 12, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In March 1989, Boise Cascade Corporation selected BE&K Construction Company, a non-union firm, to serve as construction manager and general contractor on a $500 million expansion project at its paper mill in International Falls, Minnesota. Pet. App. A7. The building trades unions had unsuccessfully sought to secure the selection of a unionized general contractor on the Boise Cascade project, and they harbored great hostility against BE&K. *Id.* at A9. Construction work on the Boise Cascade project began in early July 1989, with a work force consisting of BE&K's non-union employees and employees of both union and non-union subcontractors, but on July 18, 1989, the unionized employees walked off the job and engaged in disruptive picketing to protest against BE&K and the non-union subcontractors. BE&K responded by hiring non-union firms to replace those unionized subcontractors whose employees had participated in the walkout. Co. Br. App. 3a, 6a-7a.

Petitioner's headquarters are located in Marquette, Michigan, about 400 miles from International Falls. Its jurisdiction covers Michigan's upper peninsula. Co. Br. App. 3a, 4a. On July 24, 1989, shortly after the walkout at the Boise Cascade site, John LaVallee, petitioner's business manager, financial secretary, and treasurer,

drafted a letter advising the membership that a Minnesota local "needs our help, both financially and assisting in demonstrating their right not to work side-by-side with non-union workers." *Id.* at 12a-13a. LaVallee did not mail the letter, but a copy of it found its way into circulation among iron workers, including members of petitioner, who were employed on a large project in Michigan. The letter was also reprinted in a Minnesota newspaper. *Id.* at 13a.

b. By early September 1989, a specialty builder hired by BE&K had completed the initial phases of an employee housing center, known as a "man-camp," located about two miles from the Boise Cascade construction site. Rumors then circulated in International Falls that a large disturbance was about to occur at the man-camp. Acting on those rumors, BE&K canceled construction work for September 9 and evacuated employees residing at the man-camp. In the early morning of September 9, about 450 persons converged on the man-camp, tore down the security fence, and rioted. They overturned vehicles, vandalized the dormitories and their contents, set fire to buildings, and caused physical injury to security guards. The riot caused approximately $2 million in damage to the man-camp. Co. Br. App. 7a-9a.

Among the rioters was a group of individuals who had arrived in International Falls from Iron Mountain, Michigan, on a chartered bus about four hours before the riot began. Co. Br. App. 9a.[2] Those rioters attempted to leave International Falls shortly after the riot ended, but they were intercepted by local police. Of the 32

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[2] Iron Mountain, Michigan, is located about 75 miles from Marquette, Michigan, where petitioner is headquartered. Co. Br. App. 3a-4a.

passengers on the bus, 11 were members of petitioner, and 15 were on "travel" status with petitioner (that is, members of other locals who, for a service fee, had been referred by petitioner to jobs within its jurisdiction). Fourteen passengers were arrested by the police; seven of those were petitioner's members, three of whom were subsequently released by the authorities, and four of whom pleaded guilty to charges of criminal riot. Two individuals on "travel" status with petitioner also were arrested and pleaded guilty to criminal riot. Co. Br. App. 9a; Pet. App. B1 n.1, B3.

The services of the bus company for the chartered trip had been arranged over the telephone by someone identifying himself only as "concerned persons." Co. Br. App. 14a. Although Donald Dabb, the owner of the bus company, could not identify the voice of the person with whom he had spoken respecting the booking, telephone records revealed that 12 calls had been made between petitioner's office or LaVallee's residence and Dabb's office between September 1 and September 8, 1989. *Id.* at 17a. The bus trip originated at a bar owned by a former member of petitioner who pleaded guilty to criminal riot at the man-camp, and the cost of the bus charter was paid in cash by one of the passengers, identified only as "Dean," who placed an envelope containing the money on the dashboard of the bus shortly before the departure for International Falls. *Id.* at 14a.

Following the riot, LaVallee received inquiries from worried friends and family members of petitioner's jailed members. In response, LaVallee travelled to Duluth, Minnesota; from there, he obtained a $30,000 loan from a bank in Marquette, Michigan, where petitioner maintained several accounts. LaVallee offered his home as collateral for the loan. LaVallee used the loan proceeds to secure legal representation and bail and to pay fines

for petitioner's jailed members. Co. Br. App. 16a, 32a; Pet. App. A13, A19. LaVallee repaid the bank loan over the next two months from contributions made by petitioner's members. Pet. App. A13, B3 n.3.

2. a. The General Counsel of the National Labor Relations Board (Board) issued a complaint alleging that petitioner violated Section 8(b)(1)(A) of the National Labor Relations Act (Act), 29 U.S.C. 158(b)(1)(A), by participating in the September 9, 1989, riot at BE&K's man-camp. After a hearing, the administrative law judge (ALJ) concluded that the General Counsel failed to prove "an agency connection to [petitioner] respecting the riot," and dismissed the complaint. Co. Br. App. 33a, 37a. Observing that, "[i]n the face of a painstakingly-mounted collection of circumstantial evidence, the * * * veracity of [LaVallee] is largely controlling of the decision" (*id.* at 21a), the ALJ credited LaVallee's denial that he was the "concerned persons" who had arranged for Dabb to transport petitioner's members and others to International Falls on the day of the riot, and also his denial that he had used petitioner's funds to pay the bus charter fee. *Id.* at 25a.

The ALJ also found that the $30,000 loan secured by LaVallee was "a *personal loan* not to be accountable for by his organization in its formal sense," in light of the facts that LaVallee had pledged his residence as collateral, and that the loan was repaid by voluntary contributions from members. Co. Br. App. 32a-33a. The ALJ rejected the contention that petitioner condoned its members' riotous conduct by not disciplining them, reasoning that, as "the [rioters'] activity was not inimica[l] to trade union objectives in the Boise Cascade dispute," such discipline "would certainly be against the spirit of the union's constitution." *Id.* at 34a. The ALJ further found that LaVallee's post-riot assistance to

petitioner's jailed members did not amount to condonation by petitioner of their actions, for "the errant members were in the clutches of the criminal justice system, and [petitioner's] essential role after September 9 was to deal with them as needful strandees." *Ibid.*

b. The Board affirmed the ALJ's findings and conclusions, and adopted his order dismissing the complaint. Pet. App. B1-B4. The Board agreed with the ALJ that the General Counsel failed to prove that petitioner "participated in [the riot], or that it is otherwise responsible for it." *Id.* at B2. The Board added that LaVallee's "personal activities" on behalf of petitioner's jailed members did not constitute condonation or ratification by petitioner of the alleged misconduct for which they had been arrested; rather, "LaVallee merely assisted certain of [petitioner's] members to exercise a legal and constitutional right." *Id.* at B3.

3. The court of appeals reversed the Board's order and remanded the case to the Board for further proceedings. Pet. App. A1-A22. The court found that, while the "question of LaVallee's involvement before and during the arrangement for the fateful bus trip, as well as that of [petitioner] in light of the background of animosity against BE&K, is a very close one" (*id.* at A11), it was not necessary to decide whether petitioner violated Section 8(b)(1)(A) of the Act "up to and including the morning of the riot" (Pet. App. A12). Observing that "[t]he [Act] provides that the full gamut of agency principles applies when determining whether an unfair labor practice has occurred" (*id.* at A14),[3] the court

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[3] Section 2(13) of the Act, 29 U.S.C. 152(13), provides: "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the

concluded that petitioner, "through its officers and agents, * * * ratified, condoned and adopted the unlawful conduct of many of its own members, and affiliated union ironworkers, on September 9, 1989," and that "this conduct, together with evidence of [petitioner's] involvement preceding the riot, constituted an unfair labor practice" (*id.* at A12).

Thus, contrary to the Board, the court found "strong and convincing proof in this case [that] demonstrates condonation and ratification by [petitioner] under longstanding agency principles." Pet. App. A22. The court pointed out that: (1) bank records showed that the $30,000 loan obtained by LaVallee was not a personal loan but "in practical effect was made to accommodate [petitioner]" (*id.* at A13); (2) petitioner's office secretary was instructed not to record financial contributions made by members to help "those people in Minnesota" (*id.* at A17); (3) petitioner paid for LaVallee's trip to Minnesota, "including costs of making arrangements for obtaining bail and legal representation for [petitioner's] arrested members" (*id.* at A18-A19), even though petitioner "had *no duty* to involve itself in assisting individual members in conduct of this kind" (*id.* at A20) and there was no "legal right of the arrested persons * * * to receive financial help from the union's contributions (or from the loan) for bail, legal fees or fines" (*id.* at A21-A22); and (4) neither LaVallee nor

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question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." This provision makes common-law agency principles applicable to unfair labor practice proceedings under the Act. See *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212, 216-217 (1979); *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 736 & n.24 (1966).

petitioner ever disavowed "the riotous conduct even after guilt was clear and admitted" (*id.* at A20).

In addition to the foregoing evidence of ratification and condonation, the court found "evidence to indicate actual participation or instigating activity in the wrongful conduct on the part of [petitioner]." Pet. App. A20. The court cited circumstantial evidence that: (1) "the gathering of union adherents at International Falls on September 9 ([petitioner's] members * * * being in the vanguard) was obviously planned and organized"; (2) "[m]ost of those present, like the group from Iron Mountain, Michigan, came from a distance and were not International Falls people"; (3) "[t]here was long-standing hostility and animosity towards BE&K by LaVallee and his fellow union chiefs in the upper peninsula-Minnesota area"; (4) "[t]here was pervasive rumor and expectation of a 'watershed event' on September 9"; and (5) "LaVallee favored active assistance of Minnesota unions by [petitioner]." *Id.* at A21. The court declined to hold that the ALJ erred in his "somewhat ambivalent conclusions" about petitioner's actual participation in the riot, but it viewed the evidence that petitioner, "through its agent LaVallee, also actively participated or assisted in [the] violent acts against BE&K" as "buttress[ing]" its conclusion that petitioner subsequently ratified and condoned the violence. *Id.* at A22. "[T]he strong weight of all this evidence," the court concluded, "cannot be disregarded by giving credibility to LaVallee's hearing testimony and refusing to draw obvious inferences from the evidence herein discussed." *Ibid.*

ARGUMENT

The disagreement between the Board and the court of appeals in this case turns solely on whether the record

supports the conclusion that petitioner violated Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A), by ratifying and condoning acts of violence and property damage committed by members and affiliates in connection with the September 9, 1989, riot at BE&K's man-camp. That issue does not merit this Court's review. Nor, contrary to petitioner's submission, does the case raise any other issue warranting this Court's intervention.

1. Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), prohibits "union tactics involving violence, intimidation, and reprisal or threats thereof." *NLRB* v. *Drivers Local Union No. 639*, 362 U.S. 274, 290 (1960). It is settled that common-law agency principles, including those of ratification and condonation, apply to the determination whether a union may be held responsible for violations of the Act. *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212, 216-217 (1979); *Local 1814, Int'l Longshoremen's Ass'n* v. *NLRB*, 735 F.2d 1384, 1393-1394 (D.C. Cir.), cert. denied, 469 U.S. 1072 (1984); *NLRB* v. *Miramar of California, Inc.*, 601 F.2d 422, 425 (9th Cir. 1979). The Board found here that the evidence did not establish that petitioner ratified or condoned its members' misconduct, Pet. App. B2-B3; the court of appeals, however, took a different view of the evidence, and concluded that petitioner ratified and condoned "the unlawful conduct of many of its own members, and affiliated union ironworkers." *Id.* at A12. Although the Board believes that the court of appeals should have upheld the Board's finding that petitioner did not ratify or condone the acts of violence and property damage that occurred in this case, the Board did not file a petition for a writ of certiorari because the disagreement between the Board and the court turns solely on the inferences to be drawn from the record. The court of appeals' interpretation of

the facts in this case does not warrant this Court's review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Petitioner is mistaken in contending (Pet. 7-8) that the Board and the court of appeals are in disagreement as to whether a union's mere provision of bail and an attorney for arrested members is sufficient to constitute ratification of the members' alleged misconduct. Rather, the Board and the court disagree on the proper inferences to be drawn from all the facts of this case, which include, but are not limited to, that legal assistance. The court found that all of petitioner's acts, taken together, required the conclusion that petitioner ratified and condoned the misconduct of its members and affiliates. Those acts also include petitioner's attempt to hide the $30,000 loan by characterizing it as a personal loan to LaVallee, although it was actually made to accommodate petitioner; petitioner's failure to keep records of contributions received from members; its payment of the costs associated with LaVallee's post-riot trip to Minnesota; and its failure to disavow the riotous conduct. All of this evidence, in the court of appeals' view, was further buttressed by the fact that petitioner had "actively participated or assisted in [the] violent acts against BE&K." Pet. App. A22.[4] Had the Board drawn the same inferences from the record in this case as the court did, the Board, too, would have held petitioner responsible for the misconduct of its members

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[4] Although the court did not overturn the Board's finding that petitioner did not violate the Act "up to and including the morning of the riot," Pet. App. A12, petitioner is incorrect in suggesting (Pet. 6-7) that the court relied only on evidence of petitioner's actions after the riot in finding that it ratified and condoned the unlawful conduct.

and affiliates. See *Local 248, Meat & Allied Food Workers*, 222 N.L.R.B. 1023, 1035 (1976) (holding union responsible for picket-line misconduct where picket captains engaged in misconduct and ignored that of picketers, the union did not fine any picketer, cut off his strike benefits, or remove him from the picket line, and the union made bond and provided legal defense for picketers), enf'd mem., 571 F.2d 587 (7th Cir. 1978).

2. There is also no merit to petitioner's contention (Pet. 5-7, 8) that the court of appeals' decision is in conflict with decisions of this Court holding that a union may not be held responsible for members' misconduct merely because the union fails to disavow it. Petitioner's failure to disavow the misconduct of its members and affiliates, "even after guilt was clear and admitted," Pet. App. A20, was only one of the many factors that the court of appeals found relevant to its finding of ratification and condonation. See pp. 7-8, *supra*.

Moreover, petitioner's conduct here, as assessed by the court of appeals, is distinguishable from that of the unions involved in the decisions on which petitioner relies. In *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 393 (1922), the Court considered whether the international union could be held responsible for the destruction of coal mining property arising out of a strike called by a district union. Answering that question in the negative, the Court found that there was "nothing to show that the International Board ever authorized [the strike], took any part in preparation for it or in its maintenance * * * or rati[fied] it by paying any of the expenses." *Ibid.* The Court did observe that, "after Stewart, the president of [the district union], had been convicted of conspiracy to defeat the injunction issued to protect the [mines] * * * and had gone to the

penitentiary and was pardoned, White, the national president, wrote a letter thanking the President for this, and * * * subsequently * * * appointed Stewart to a position on a District committee." *Id.* at 394. The Court concluded, however, that "[i]t would be going very far to consider such acts of [White] alone a ratification by the International Board creating liability for a past tort." *Ibid.*

In *Carbon Fuel Co.* v. *United Mine Workers*, *supra*, the Court held that the international union and a district union could not be held responsible for wildcat strikes called by local unions, where there was no evidence that "either the District or International Union instigated, supported, ratified, or encouraged any of the work stoppages" (444 U.S. at 218), and where the international union repeatedly expressed its opposition to wildcat strikes (*ibid.*). And, in *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), the Court concluded that the evidence of record did not meet the "special proof requirements" made applicable by federal law to state-law tort claims against unions. *Id.* at 735.[5] Specifically, the Court found that "the requisite showing was not made as to possible union authorization of or partic-

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[5] The federal statute involved in *Gibbs* was Section 6 of the Norris-LaGuardia Act, 29 U.S.C. 106, which provides that no union "shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." Because the Norris-LaGuardia Act, where it applies, establishes a "more restrictive test of union responsibility" than the common-law test of agency that governs unfair labor practice proceedings under the National Labor Relations Act, see *Carbon Fuel Co.*, 444 U.S. at 217 n.6, the relevance of *Gibbs* to the instant case is particularly attenuated.

ipation in the violence" (*id.* at 738), and that "the record fail[ed] to rebut [the union's] contention that it had been unwilling to see its ends accomplished through violence, and indeed had sought to control the excesses which had occurred" (*id.* at 742). In sum, unlike the case at bar, none of those decisions involved an evidentiary record from which it could properly be inferred that the union had ratified or condoned its members' unlawful conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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